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NO. 84-1765

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

JACK G. NEAL,

Petitioner.

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS, AS INTERPRETED BY THIS COURT IN *FARETTA V. CALIFORNIA*, 422 U.S. 806 (1976), REQUIRE A COLLOQUY BETWEEN THE TRIAL COURT AND A DEFENDANT RELATING TO THE DANGERS AND DISADVANTAGES OF SELF-REPRESENTATION.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is attached to the petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement of the case.

SUMMARY OF THE ARGUMENT

Whether a record colloquy is required to demonstrate a knowing and intelligent waiver of the right to counsel is a question unworthy of this Court's attention. Moreover, there is substantial agreement among the federal courts of appeals that the constitution does not mandate a record colloquy. In the instant case, it was reasonable for the trial court to conclude that Petitioner was fully aware of the dangers of self-representation without such a colloquy. The question presented for review is insufficiently substantial to warrant the exercise of this Court's certiorari jurisdiction.

ARGUMENT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that "a review of writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Petitioner has advanced no reasons beyond his personal interest in this case. He has not demonstrated that the question presented is an important federal question, and it is not.

II. THERE IS SUBSTANTIAL AGREEMENT AMONG THE CIRCUITS ON THE QUESTION PRESENTED FOR REVIEW.

As Petitioner admits, the federal courts of appeals are in substantial agreement with respect to the question he presents.

A colloquy between the trial judge and a defendant is not a required method of ascertaining whether the defendant voluntarily, knowingly and intelligently waived his right to representation by counsel. It is recognized by all the courts of appeals that the proper inquiry is to evaluate the circumstances of each case. *Maynard v. Meachum*, 545 F.2d 273 (1st Cir. 1976); *United States ex rel. Kogsberg v. Vincent*, 526 F.2d 131 (2nd Cir. 1975); *United States v. McFadden*, 630 F.2d 963 (3rd Cir.), *cert. denied*, 450 U.S. 1043 (1981); *United States v. King*, 582 F.2d 888 (4th Cir. 1978); *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985); *United States v. McCaskill*, 585 F.2d 189 (6th Cir. 1978); *United States v. Trapnell*, 638 F.2d 1016 (7th Cir. 1980); *United States v. Pilla*, 550 F.2d 1085 (8th Cir.), *cert. denied*, 432 U.S. 907 (1977); *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982); *United States v. Welty*, 674 F.2d 185, 187 (10th Cir. 1982); and *United States v. Bailey*, 675 F.2d 1292, 1298-1300 (D.C. Cir. 1982).

In light of the unanimity among the circuits, the question presented does not raise a dispute that requires this Court's attention.

III. PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL, SINCE HE WAS FULLY AWARE OF THE DANGERS AND DISADVANTAGES OF SELF-REPRESENTATION.

In *Faretta v. California*, 422 U.S. 806, 835 (1975), this Court held that in order for a criminal defendant to elect to proceed *pro se*, he must knowingly and intelligently forego the benefits of counsel. A defendant must therefore be made aware of the dangers and disadvantages of self-representation.

Faretta did not mandate a colloquy between the judge and the defendant concerning the pitfalls of self-representation. Instead, it left open the matter of how a trial court might determine that a defendant is aware of those disadvantages. Thus, when a trial court is unable to determine by other means that a defendant knows of those dangers, the court will have to directly confront the defendant. But where, as here, it is obvious to the court that the defendant is fully aware of the hazards of self-representation, such a colloquy would be a

meaningless exercise, a mere formality without reason or substance.

At the pretrial hearing on March 22, 1978, Petitioner submitted a motion to allow *pro se* appearance stating, in pertinent part:

> That Jack G. Neal, defendant, is a duly licensed attorney of the State Bar of Texas with many years of trial experience in both civil and criminal matters; and he is well able to represent himself in this cause, being knowledgeable, both as to the law and the facts; and further, that he desires to appear *pro se* in this matter, and that he has so appeared in this cause to this time.

It was reasonable for the trial judge to conclude, without further inquiry, that Petitioner was aware of the consequences of his actions when he asked to represent himself and that he was acting "with his eyes open." The cautious trial court went further, asking the Petitioner at the hearing whether he desired to continue *pro se* pursuant to his motion. Petitioner assured the court that he did.

Faced with these circumstancs, the trial court reasonably concluded that Petitioner had knowingly and intelligently waived his right to counsel and granted Petitioner's motion to appear *pro se.* Petitioner's subsequent request for a continuance "until such time as William F. Alexander can appear as Defendant's counsel" did not affect the validity of the original waiver. (Petition for Writ of Certiorari, App. A-8).

The matter of a continuance is within the discretion of the trial judge. *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964). In holding that the trial court did not abuse its discretion in denying a continuance, the Texas Court of Criminal Appeals reasoned as follows:

> On March 3, the trial court told the parties that trial would begin on April 3. Appellant formally waived his right to counsel in his motion to appear pro se, made and granted on March 22, twelve days before

> he knew he was to go to trial. Not until March 25 did appellant even contact the lawyer he contends he had told the trial court in early March he *might* retain. On April 3, the court called the case for trial in Sulphur Springs. Appellant moved the court to continue the trial "until such time as William G. Alexander can appear as defendant's counsel," with no indication of when that time might come, if ever.

(Petition, App. A-9) *See Ungar v. Sarafite*, 376 U.S. at 589-91. Petitioner's belated attempt to obtain this continuance in no way indicates that his waiver of counsel was made without awareness of the dangers and disadvantages of self-representation.

Petitioner's reliance on *Von Moltke v. Giles*, 332 U.S. 708 (1948) is misplaced. In *Von Moltke*, the defendant, charged with espionage, waived counsel, confessed, and pled guilty. As Petitioner concedes, "there is a qualitative difference between a waiver of counsel and the entry of a plea of guilty to a judge, *cf. Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), as opposed to a waiver of counsel and self-representation in a contested lawsuit before a jury." (Petition at 7). Three federal constitutional rights are involved in a waiver that occurs when a defendant pleads guilty: privilege against compulsory self-incrimination, right to trial by jury, and the right to confront one's accusers. *Boykin v. Alabama*. The waiver of counsel prior to self-representation in a contested law suit involves only sixth and fourteenth amendment rights. While those rights deserve protection, this Court faces a very different situation than in *Von Moltke*. In addition, the language Petitioner cites states only that "a judge must investigate as long and as thoroughly *as the circumstances of the case before him demand*" in determining the validity of a defendant's waiver of the right to counsel. *Id.* at 723.

Petitioner asks this Court to require, as a matter of federal constitutional law, a record colloquy which would likely become nothing more than a routine inquiry. As the law presently stands, trial courts will, in some circumstances, be required to make an on-the-record investigation of a defendant's awareness of the dangers and disadvantages of self-representation. But

in those instances where a defendant's awareness is either admitted, as in the present case, or clear from all the circumstances, it would be counterproductive to require such an inquiry. The issue presented for review is insufficiently substantial to warrant the exercise of this Court's certiorari jurisdiction.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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